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In The
Supreme Court of the United States

EDWARD GREEN JAMESON,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

REPLY TO BRIEF IN OPPOSITION

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REPLY TO COUNTERSTATEMENT OF THE FACTS AND PROCEEDINGS

While the Commonwealth describes in detail the "secondary effects" legislative preambles to Ord. 2000-4 (Opp. at 2-4), it does not deny, or even attempt to address, the unmistakable but irrefutable fact pointed out in the petition that *none* of the reviewing courts ever had before them the government's *evidence* that supposedly served as the basis for the enactment of the challenged ordinance. The underlying question in this petition is, after all, whether – under the plurality standards of *City of Los Angeles v. Alameda Books Inc.*, 535 U.S. 425 (2002) – Mr. Jameson's (the criminal defendant below) *unrebutted* witness testimony and documentary submission "cast direct doubt" upon the *evidentiary* record that McCracken County (sometimes the "County") had supposedly compiled as a basis for concluding that the enactment of Ord. 2000-4 was necessary to address a documented concern of adverse secondary effects.

By its silence, the Commonwealth has acknowledged what should be a startling (and, more importantly, constitutionally disconcerting) observation that all of the courts below felt that they could appropriately evaluate whether Mr. Jameson's submission successfully rebutted a governmental evidentiary record *that they never in fact examined.* Four separate courts were asked to determine whether Mr. Jameson's presentation "cast direct doubt" upon the County's claimed governmental interest of addressing adverse secondary effects. Two courts (the McCracken district and circuit courts) declined to specifically address the issue. The Kentucky Court of Appeals concluded that Mr. Jameson's evidence did, indeed, fulfill the criteria set forth in the *Alameda Books* plurality. The State Supreme Court came to exactly the opposite conclusion, finding that

Mr. Jameson's evidence did not meet this standard. Yet, in reaching such diametrically opposite conclusions, none of the courts had before them the *evidence* that the government supposedly relied upon in order to be able to properly evaluate such an evidentiary attack.

If courts believe that they are free to determine whether or not certain evidence has been rebutted, without ever actually having *that evidence* to review, examine and analyze, this demonstrates that further direction from this Court is desperately needed.

The Respondent also claims that the findings set forth in the ordinance preambles "focus on one category of secondary effects: illicit sexual behavior on the premises of sexually oriented businesses." Opp. at 3-4. First, these findings relate to the ordinance provision that require doors to be removed from "peek booths"; a matter irrelevant to the ordinance sections that Mr. Jameson was charged with violating. *See* Petition, at 6 n.6. Second, such findings cannot explain in any regard the justification of the "hours-of-operation" provision that served as part of the basis of Mr. Jameson's prosecution.

Next, the Commonwealth describes Mr. Jameson as operating "his" club (Opp. at 4), although he was only the manager. The Respondent further states that Mr. Jameson violated the ordinance by "allow[ing] total nudity by the dancers and physical contact between nude dancers and customers," (Opp. at 4), without responding to the observation set forth in the Petition (at 2 n.1) that Ord. 2000-4 contains no respondeat superior liability provision and therefore does not place criminal exposure on a club manager for a violation of the ordinance proscriptions by an entertainer.

The Commonwealth then states that the crime data to which dispatcher Brent Stringer testified included "only the raw number of calls for police service from certain addresses." Opp. at 5. However, this is a gross misstatement of Mr. Stringer's testimony. As pointed out in the petition (at 7), the records submitted in the evidentiary hearing included calls where officers were dispatched, activities that were self-reported by police officers, and reports concerning undercover investigations.[1] *See also* Reply App. 22-25.

Additionally, the Commonwealth further attacks Mr. Jameson's evidence by pointing out that "Mr. Stringer did not testify as to the number of patrons, size, or occupancy limits of any establishment." Opp. at 5. However, there is not a single judicial decision that purports to require such information to be evaluated as a requisite to admissibility. Moreover, the "pre-packaged" studies that governments normally rely upon in order to justify the enactment of adult business regulations fail to contain any of the analysis elements that the Commonwealth claims to be methodologically necessary here.

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[1] Consequently, the Commonwealth's assertion that police undercover investigations were *not* included in the police records examined (Opp. at 5, citing the Kentucky Supreme Court's statement to that effect at Pet. App. 50), is blatantly false. Mr. Stringer's *actual testimony* was quite to the *contrary*. *See* Reply App. 24.

CIRCUIT RULINGS ISSUED *AFTER* THE FILING OF THE UNDERLYING PETITION DEMONSTRATE THAT CLARIFICATION BY THIS COURT OF THESE EVIDENTIARY STANDARDS IS NEEDED

In its opposition, the Commonwealth relies heavily upon the recent Eleventh Circuit decision in *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860 (11th Cir. 2007). Irrespective of the fact that this ruling is at diametric odds with that circuit's earlier rulings in *Flanigan's Enter., Inc. v. Fulton County, Ga.*, 242 F.3d 976 (11th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002), and *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004) (*compare* descriptions of those rulings in the Petition, at 16-18),[2] the Respondent, however, inexplicably omits from its memorandum an even more recent circuit ruling[3] that fully demonstrates the conflicts in the lower courts in regard to these unclear evidentiary standards.

Shortly after the release of the *Daytona Grand* opinion, the Tenth Circuit issued its ruling in *Abilene Retail #30, Inc. v. Board of Com'rs of Dickinson County, Kan.*, 492

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[2] A petition for rehearing en banc is currently pending in *Daytona Grand*.

[3] The failure of the Commonwealth to bring this critical appellate decision to the attention of this Court in its Opposition cannot be excused on the basis that the ruling was too new to have been discovered. The attorney for the Commonwealth here is also counsel for the county in the *Abilene Retail* case; he was obviously then aware of the Tenth Circuit opinion; and he had, in fact, filed a motion for en banc review of that decision *before submitting the response in this matter*. *See* Reply App. 1-19. Because of this and the other matters discussed in the following section, the omission of this ruling in the Opposition should be quite disturbing to this Court.

F.3d 1164, 2007 WL 1982130 (10th Cir.), which is basically directly contrary to the Eleventh Circuit's decision (*see also* further discussion in following section below). This conflict is all the more critical because the challenges brought by the adult businesses in the two cases utilized the *exact same secondary effects expert witness*: Dr. Daniel Linz. While the Eleventh Circuit found that his testimony did not "cast direct doubt" upon the secondary effects justification of the municipal ordinance at issue in that proceeding, the Tenth Circuit came to basically the opposite conclusion in regard to the challenged law there.

Abilene Retail includes both a majority opinion *and a three-judge (unanimous) concurrence*. The majority opinion authored by Judge Lucero concluded that Dickinson County had not satisfied its initial evidentiary opinion to justify the enactment of the zoning ordinance in question there. *Id.* at **1 n.1, 6-9.

The concurrence of Judge Ebel, which the other two panel members joined as an alternative basis for their ruling (*see id.*, at *9 n.13), is, however, more telling in regard to the various circuit splits on these issues. The unanimous concurrence concluded that the testimony and evidence submitted by the adult business had, indeed, "cast direct doubt" upon the county's evidence and, therefore, shifted the burden back to the county to attempt to justify the necessity for the challenged zoning regulation. *Id.* at **15-17.

Specifically, the appellate court listed for its conclusion five studies conducted by Dr. Linz finding that adult uses do not cause the types of problems that the county sought to prevent (*id.* at *15), an "academic peer-reviewed

article that he wrote with others[4] challenging the validity of the County's studies" (*id.* at *16), and "[m]ore importantly, perhaps," the fact that Abilene Retail had presented evidence that its store had not, in fact, produced any of the feared adverse secondary effects. *Id.* at *15. But this is *virtually the same evidence that the Eleventh Circuit dismisses in Daytona Grand. See* 490 F.3d at 883-885. *See also Daytona Grand, Inc. v. City of Daytona Beach*, 410 F.Supp.2d 1173, 1179-1188 (M.D. Fla. 2006) (discussing the "local" secondary effects evidence, and Dr. Linz's testimony and supporting materials, submitted at trial).

In addition, the comparison of the *local* evidence that Mr. Jameson and Abilene Retail presented also illustrates the lack of clarity of these evidentiary standards. While the Kentucky Supreme Court chastises Mr. Jameson's reliance upon police records in the form of *calls for service*[5] (Pet. Appx. at 50-51),[6] the Tenth Circuit specifically relies upon such data presented by the county undersheriff in order to conclude that the adult business at issue there did not engender any forms of adverse secondary effects. 2007 WL 1982130, at *1 n.1. *See also id.* at *15 (Ebel J., concurring) (in commenting upon this and other evidence, the three-judge concurrence stated: "More importantly, perhaps, Abilene Retail also presented evidence that its store has in fact not produced any of the negative secondary effects that the County's ordinance was designed to eliminate"). *Accord Flanigan's Enter., Inc.*, 242 F.3d at 979

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[4] The undersigned being one of them.

[5] However, as pointed out above, the records submitted in the evidentiary hearing here included far more information than mere calls for service.

[6] *Accord, Daytona Grand*, 490 F.3d at 883-884.

(police study based upon calls for service data showed greater crime at bars that do not feature exotic dancing than adult entertainment venues, and served as a basis to invalidate the challenged law there).[7]

A CLEAR CIRCUIT CONFLICT EXISTS THAT WARRANTS REVIEW BY THIS HONORABLE COURT

Throughout its Opposition, the Commonwealth eschews the necessity of review of this case because, it contends, no conflicts in the circuits exist on these issues. *See, e.g.*, Opp. at 10 (" . . . the lower courts are *quite consistent in the results that they reach*"); 16-17 (" . . . lower courts have carefully followed this Court's precedents and have *reached consistent results* . . . "); and at 20-21 ("There is *no lower-court conflict* stemming from this case") (emphasis added).

However, only 29 days before submitting the response to this petition, the *same attorney who is representing the County here* asserted the existence of such a circuit conflict as a basis for seeking en banc review of these issues by the Tenth Circuit in *Abilene Retail*. *See* Petition for Rehearing En Banc (in *Abilene Retail*), Reply App. 2 ("The proceeding involves the following questions of exceptional

[7] There is also disagreement about the relevance of so-called "anecdotal" evidence. *Compare, for example, World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1195-1196 (9th Cir. 2004) (anecdotal evidence can satisfy the government's initial burden), and cases cited therein, *with Top Flight, Inc. v. City of Inkster*, 2007 WL 643897 (E.D. Mich.), at *10 (anecdotal evidence insufficient to "cast direct doubt" upon governmental evidence).

importance, namely, that *the panel decisions conflict with the authoritative decisions of other United States Courts of Appeals . . . ,"* including, among others, *Daytona Grand*) (emphasis added); and at 16 (argument that the unanimous three-judge concurrence conflicts with *"every other circuit"* ruling on this evidentiary issue, and comparing, again, the Eleventh Circuit holding in *Daytona Grand*) (emphasis in original).[8]

Accordingly, that a clear circuit conflict exists so as to warrant review by this Honorable Court is demonstrated no better than by the *very words of the Commonwealth's own attorney*, albeit in another proceeding.[9]

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[8] Shortly before the filing of this reply brief, the Sixth Circuit chimed in, acknowledging the confusion regarding evidentiary standards. *See Hamilton's Bogarts, Inc. v. State of Michigan*, ___ F.3d ___, 2007 WL 2438044 (6th Cir.) at *6 n.7 (Discussing the "complicated nature of the analysis" under *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and finding that there "thus appears to be a difference in the evidentiary standard that the plurality and Justice Souter would require . . . ").

[9] Another circuit split is directly recognized by the court in *Abilene Retail*. In stating that it could not conclude that the county there met its initial evidentiary burden, by observing that "[s]uch a holding *would require complete deference to a local government's reliance upon prepackaged secondary effects studies from other jurisdictions to regulate any single sexually oriented business, of any type, located in any setting*," the Tenth Circuit noted that in so ruling "[w]e decline to adopt the reasoning of the Fifth Circuit on this point." *Abilene Retail*, 2007 WL 1982130, at *7 & n.10 (emphasis added), *distinguishing LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002).

WHY THE CONFUSION OVER THIS EVIDENTIARY STANDARD JUSTIFIES THE GRANTING OF THE WRIT

The issue in this petition does not represent some meaningless, esoteric, evidentiary conundrum. Rather, the real underlying question is whether there is to be any true judicial check on otherwise unrestrained censorship.

This is because the type of secondary effects studies that McCracken County supposedly relied upon in enacting Ord. 2000-4, were prepared to justify dispersal-type zoning ordinances, which have subsequently been enacted and, presumably, have then rectified the secondary effects problems they were admittedly designed to address. Without placing some burden upon government to establish that secondary effects *still* exist so as to justify *additional* regulations, and without allowing a litigant a real ability to *refute* the claim that certain expression (subject to a specific set of existing regulations) engenders adverse secondary effects, governments will be free to enact a never-ending array of ever-more restrictive regulations until that expression is so suppressed that it will disappear from the marketplace.

The ability of government to engage in unchecked censorship of controversial speech and expression-related activities based on the oft-claimed concern of "adverse secondary effects," – which will certainly be the result if the decision of the Kentucky Supreme Court is allowed to stand – warrants this Court granting the petition.

CONCLUSION

For the reasons set forth above and in his Petition for a Writ of Certiorari, Petitioner respectfully requests this Honorable Court grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: September 4, 2007

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App. 1

No. 05-3473

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ABILENE RETAIL #30, INC.,

Plaintiff/Appellant,

v.

BOARD OF COMMISSIONERS OF DICKINSON COUNTY, KANSAS; KEITH D. HOFFMAN,

Defendants/Appellees.

PETITION FOR REHEARING EN BANC

Appeal from the United States District Court for the District of Kansas

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The County respectfully petitions the Court to rehear this matter en banc.

STATEMENT PURSUANT TO FED. R. APP. P. 35

A. The panel decisions conflict with the following decisions of the Supreme Court of the United States and the precedents of this court, and consideration by the full court is necessary to secure and maintain uniformity of the court's decisions:

1. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (permitting small community to rely on secondary effects evidence from large metropolitan city).

2. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (rejecting report by Daniel G. Linz, the expert witness for Abilene Retail in this case).

3. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (holding local governments may rely on secondary effects evidence that is not on point).

4. *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998) (upholding law making "retail-only" adult bookstore relocate at least 1,500 ft. from homes).

B. The proceeding involves the following questions of exceptional importance, namely, that the panel decisions conflict with the authoritative decisions of other United States Courts of Appeals that have addressed the issues, to wit:

1. *LLEH, Inc. v. Wichita County,* 289 F.3d 358, 366-67 (5th Cir. 2002) (holding that rural county could rely on secondary effects studies performed in cities).

2. *G.M. Enterprises, Inc. v. Town of St. Joseph,* 350 F.3d 631 (7th Cir. 2003) (holding that Dr. Linz's testimony is insufficient as a matter of law to "cast direct doubt" on legislative rationale and shift evidentiary burden under *Alameda Books*); *SOB, Inc. v. County of Benton,* 317 F.3d 856 (8th Cir. 2003) (same); *Gammoh v. City of La Habra,* 395 F.3d 1114 (9th Cir. 2005) (same); *Daytona Grand, Inc. v. City of Daytona Beach,* ___ F.3d ___, 2007 WL 1851169 (11th Cir. 2007) (same).

INTRODUCTION

This case presents the Lion's Den Adult Superstore's (Abilene Retail's) challenge to a County Ordinance regulating the time, place, and manner of sexually oriented business operations. The district court – noting the Ordinance's extensive legislative record (27 judicial opinions, 20 secondary effects reports, and expert witness reports) – followed *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 438 (2002), and this Court's on-point decision in *Z.J. Gifts D-2, L.L.C. v. City of Aurora,* 136 F.3d 683 (10th Cir. 1998), in upholding the Ordinance on summary judgment.

The panel reversed. The majority opined that none of the studies "examine businesses situated in an entirely rural area" (Maj. Op. 20), and thus held that a genuine issue of material fact exists as to whether the Board of County Commissioners adduced "any evidence that is

'reasonably believed to be relevant'" to support the Ordinance. *Alameda Books,* 535 U.S. at 438 (quoting *Renton,* 475 U.S. at 51-52 (1986)).

The concurring judge disagreed with the majority's conclusion (Concur. Op. 2-11), but joined in reversing the district court on the theory – heretofore rejected by *every* circuit court to address it – that Dr. Daniel Linz's testimony "casts direct doubt" on the Board's legislative rationale, requiring a trial. The majority joined in the concurrence "as an alternative ground for [their] holding." (Maj. Op. 2.)

This issue is vitally important to local governments. The majority decision undermines the ability of rural municipalities to regulate sexually oriented businesses, and the concurrence undermines the ability of all municipalities to do so.

This petition follows.

ARGUMENT AND AUTHORITIES

I. The majority's holding that the Board's extensive record is not "any evidence reasonably believed to be relevant" conflicts with decisions of the Supreme Court, this Court, and the only other circuit to address the issue.

In defending an ordinance regulating the secondary effects of sexually oriented businesses, a local government "may rely on *any* evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books,* 535 U.S. at 438 (emphasis supplied) (quoting *Renton,* 475 U.S. at 51-52 (1986)).

Despite the County's extensive secondary effects record – including everything previously mentioned *and* secondary evidence from another *Lion's Den* store on the *same* interstate in another *rural* county (*see* App. 2538-2583, *esp.* 2548-2550 & 2578-2579) – the majority reversed the district court's summary judgment because none of the studies "examine businesses situated in an entirely rural area." (Maj. Op. 20.)

As an initial matter, the "rural vs. urban" distinction was *never argued by the plaintiff in the district court or in this Court.* Although the majority faults the County for not answering this argument (Maj. Op. 23), it first appeared in the majority's opinion. As Judge Ebel's concurrence recognizes, "Abeline Retail has never itself drawn that distinction, let alone presented any evidence to support that distinction." (Concur. Op. 14 n.7.) Abilene Retail's failure to make the argument is not surprising, given that the Supreme Court has consistently afforded local governments wide latitude to experiment with regulations and draw inferences from legislative evidence. *Alameda Books,* 535 U.S. at 437-39. Under the Court's precedents, the distinction is constitutionally irrelevant.

Second – as Judge Ebel's concurring opinion aptly demonstrates – the majority's holding that the County's voluminous record is insufficient to meet *Renton's* deferential standard is inconsistent with well-established Supreme Court and federal appellate precedent. (Concur. Op. 1-11.)

A. Requiring secondary effects evidence from "an entirely rural area" is contrary to *Renton*, *Alameda Books*, and *City of Aurora*.

As Judge Ebel correctly observes, the government's evidentiary burden is "very light" (Concur. Op. 4), and "[c]ourts have consistently upheld ordinances based on the same *type* of evidence" adduced by the County in this case. (*Id.* at 6-7) (emphasis in original) (citing *Renton* and several federal appellate cases).

In *Renton,* the Ninth Circuit had invalidated the Renton ordinance on the ground that Renton failed to show that its legislative evidence – from Seattle, a city twenty times Renton's size – was relevant "to the particular problems or needs of Renton." *Playtime Theatres, Inc. v. City of Renton,* 748 F.2d 527, 537 (9th Cir. 1984). The Ninth Circuit also emphasized that "[a]lthough the Renton ordinance *purports* to copy Detroit's and Seattle's," it adopted a zoning approach different than both of them. *Id.* at 536 (emphasis in original).

The Supreme Court reversed on all counts, stating that "[i]t is clear" that the Renton ordinance "is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication." *Renton,* 475 U.S. at 50. The Court rejected the more "rigid burden of proof" imposed by the Ninth Circuit and held that a local government is not required to "produce evidence independent of that already generated" by other jurisdictions, as long as the government relies on some evidence "reasonably believed to be relevant" to the problem it seeks to address. *Id.* at 51-52.

The Court then stated:

> Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.
>
> We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [The] city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." [*Young v.*] *American Mini Theatres*, 427 U.S.[50], at 71 (plurality opinion).

Id. at 52.

The majority opinion in this case contravenes *Renton* and its progeny. The majority recognizes that "most, if not all," of the County's studies "find that adult businesses trigger at least some secondary effects in the surrounding areas," but the majority concludes that these findings "rest on" a "number of factors, including: [1] the type of neighborhood in which the sexually oriented businesses are located, [2] the concentration of sexually oriented businesses, and [3] the nature of the sexually oriented business itself." (Maj. Op. 18-19, footnotes omitted.) Based on these factors, the majority concludes that the County cannot reasonably rely on *any* of the studies to regulate a

"single adult bookstore, located on a highway pullout far from any business or residential area within the County." (Maj. Op. 20.)

As a factual matter, the Lion's Den Adult Superstore is not "far from any business . . . area within the County" – it is in a business (B-1) zone. Second, it is close (less than 1,200 ft.) to a family residence. Indeed, this Court has upheld a *1,500-ft.* buffer from residences, even as applied to a "retail" adult bookstore. *City of Aurora,* 136 F.3d at 685 (upholding ordinance requiring adult bookstore to relocate to a site at least 1,500-ft. from, *inter alia,* "residential districts or dwellings. . . . ").

To support the three prongs comprising its more rigid burden of proof (Maj. Op. 24) (*i.e.*, location, concentration, and type of business), the majority quotes statements from the studies – *none* of which were quoted by plaintiff.

In support of the first prong (location), the majority cites a statement (*see* Maj. Op. 19 n.7) from the Austin, Texas, study that suggests restricting sexually oriented businesses to regional commercial zoning districts, which include interstates. Later, the majority quotes this same statement for its view that requiring the relocation of The Lion's Den Adult Superstore away from its present location (at an interstate interchange and close to a residence) violates the Board's reliance on the studies. (Maj. Op. 24.)

As in *Renton,* however, this criticism goes to the "method chosen" to address secondary effects, not the identification of those effects. 475 U.S. at 52.

Moreover, it plainly contravenes *Renton's* admonition that courts should not "appraise the wisdom" of the County's legislative solution. *Id.*; *see also City of Aurora,*

136 F.3d at 689 (noting that "*Renton's* constitutional framework" gives the government "broad discretion to choose the means and scope of its regulation of sexually oriented businesses," and that the judiciary's role in review is "limited").

In a rural county, land at interstate interchanges may well be the most valuable commercial real estate in the jurisdiction. It also may be a location where the community is seeking to spur economic growth and development, protect "retail trade, maintain property values," *etc. Renton,* 475 U.S. at 48. Sexually oriented businesses at these locations can deter positive development and can also attract prostitutes catering to truckers. Further, the record in this case includes a permanent injunction order against another Lion's Den Adult Superstore located at an interstate interchange in another *rural* county (Effingham County, Illinois) on the *same* interstate (I-70). (App. 2538-2583.) There, the court found significant evidence of secondary effects on the surrounding vicinity, including incidents of solicitation, litter of sex toys and related materials, and decreased use of a nearby public park. (App. 2548-2550.) The court concluded that the community was "irreparably harmed by the continuing increased exposure to the negative secondary effects resulting from close proximity to" the Lion's Den. (App. 2578-2579); (*see also* App. 2494-2496) (noting increase in serious crime after opening of that store).

The majority's second prong, "the concentration of sexually oriented businesses," is an improper basis under *Renton* for nullifying the Board's reliance on the studies. First, to the extent that the studies documented secondary effects associated with concentrations of adult businesses, the County's ordinance serves the interest in preventing

those effects by prohibiting a sexually oriented business within "1200 feet of any structure occupied by another sexually oriented business." Ordinance No. 121304A § 21(b)(1). Second, *Renton* recognizes the government's substantial interest in "preventing the secondary effects caused by the presence of even one" adult business. 475 U.S. at 50.

The third prong, the "nature of the sexually oriented businesses" studied, does not determine the propriety of reliance on the studies. The Supreme Court has repeatedly allowed local governments to rely on evidence from one type of adult business to regulate another type of adult business. *See, e.g., Alameda Books,* 535 U.S. at 438 (citing *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 584 (1991) (Souter, J., concurring in judgment), for the proposition that government may "use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects"). The requirement is simply that the government refrain from regulating "businesses which have a minimal or nonexistent connection to sexually oriented entertainment." *City of Aurora,* 136 F.3d at 689.

Indeed, *Alameda Books* reiterated, if not expanded, the deferential *Renton* standard by allowing local governments to rely on *inferences* and by emphasizing that they "must be given a reasonable opportunity to experiment" in regulating to prevent secondary effects. *Alameda,* 535 U.S. at 439; *id.* at 444 (Kennedy, J., concurring in judgment) (noting that "the plurality's application of *Renton* might constitute a subtle expansion").

The Supreme Court has upheld regulations of sexually oriented businesses where the government relied on: (1) no

evidence of secondary effects *at all, Barnes,* 501 U.S. at 568; (2) a case and secondary effects study from a very different jurisdiction, *Renton,* 475 U.S. at 51; and (3) a local study that was admittedly not on-point. *Alameda Books,* 535 U.S. at 436. But *no court* has ever held that a legislative record as extensive as Dickinson County's fails to meet the deferential "reasonably believed to be relevant" standard.

B. The majority's holding conflicts with the authoritative decision of the only other circuit that has directly addressed the issue.

After raising the "rural vs. urban" distinction *sua sponte,* the majority rejected the Fifth Circuit's on-point holding in *LLEH, Inc. v. Wichita County,* 289 F.3d 358 (5th Cir. 2002). (Maj. Op. 20 n.10) (holding rural county can rely on studies done in cities).

The Board *specifically relied* on the *LLEH* case when adopting the Ordinance (*see* App. 1564) (presentation to Board giving prominence to *LLEH* case), *and* incorporated the case into its legislative findings. *See* Ordinance § (1)(b).

Nevertheless, the majority criticized the Fifth Circuit for allowing Wichita County to consider the county's "continued growth and development" in adopting sexually oriented business regulations. (Maj. Op. 20 n.10.) The majority reasoned that "[n]othing, of course, prevents the [Dickinson County] Board or any other legislative body from reconsidering its zoning laws in the event that it sees an uptick in the number of sexually oriented businesses locating in its jurisdiction."

This analysis turns *Renton* on its head. *Renton* held that local evidence of secondary effects is not required and that communities can be proactive in regulating adult businesses to prevent such effects. 475 U.S. at 51-52. The majority would require local governments to act after the fact – only after they have experienced an "uptick" in adult businesses and have experienced their negative secondary effects.

Even the authorities that the majority cites belie its argument. *See Barnes,* 501 U.S. at 568 (upholding regulation with *no legislative record*); *Essence, Inc. v. City of Federal Heights,* 285 F.3d 1272, 1285 (10th Cir. 2002) (upholding reliance on experience of other jurisdictions, concluding that city "need not wait until the secondary effects actually exist," and treating legislative findings as "particularized, expert judgments").

LLEH quoted and followed *Renton,* 475 U.S. at 51-52, explaining that:

> To the extent the district court focused on the area in Babe's immediate vicinity, the court erred. "Regulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their *general* effect." *United States v. Albertini,* 472 U.S. 675, 688-89, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985) (emphasis added). Moreover, "the First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception *in the particular case* will not threaten important government interests." *Id.* at 688 (emphasis added; citing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288,

296-297, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)).

LLEH, 289 F.3d at 366-67.

Here, the majority opinion contravenes not only *Renton* and *LLEH,* but also well-settled principles of the time, place, and manner doctrine.

II. The concurring opinion, which the majority joined as an alternative ground for its holding, conflicts with decisions of the Supreme Court and *every other circuit* to address the issue.

The concurrence thoroughly explains all the reasons why the majority's holding is erroneous. (Concur. Op. 2-11.) Thereafter, the concurrence examines the testimony of Abilene Retail's expert witness, Dr. Daniel Linz, who: (1) authored, jointly with his graduate assistant and an adult business lawyer, a law review article (*see* App. 2023) that challenges the validity of secondary effects studies under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), (2) criticized certain reports in the County's record for not meeting proper "methodological standards," and (3) conducted five studies of his own purporting to indicate that sexually oriented businesses do not cause adverse secondary effects.

The concurrence holds that Dr. Linz's testimony casts direct doubt on the record and rationale for the County's ordinance. (Concur. Op. 2.) The majority joined this holding as an alternative ground for its ruling. (Maj. Op. 25 n.13.) That holding is contrary to Supreme Court precedent and every other circuit court case on point.

A. The concurring opinion's holding – that Dr. Linz "cast direct doubt" on whether the Board meets "the standard set forth in *Renton*" – is contrary to *Erie* and *Alameda Books*.

In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), Dr. Linz submitted, as an appendix to an *amicus* brief filed by adult business lawyers, a paper attacking several secondary effects studies relied upon by legislative bodies on the ground that they did not meet the standards set forth in *Daubert*. *See* Brief and Appendix of First Amendment Lawyers Association, 1999 WL 805047, *20 (noting that according to Dr. Linz's attached paper, "absolutely none of the studies that purport to find such a connection [between sexually oriented businesses and secondary effects] have been conducted with methodology sound enough" to satisfy *Daubert*).

In *City of Erie*, Justice O'Connor's plurality noted the city council's legislative findings – which were unsupported by any evidence in the record – were to be treated as "expert judgment" that "should be credited." 529 U.S. at 298. The plurality then addressed Dr. Linz's paper: "And the study relied on by *amicus curiae* does *not cast any legitimate doubt* on the Erie city council's judgment about Erie. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16-23." *Id.* (emphasis supplied).

Later, in addressing Justice Souter's dissenting opinion that empirical proof should be required, the plurality again referenced Dr. Linz's paper and stated that the Court had "flatly rejected" the idea "that the 'invocation of academic studies said to indicate' that threatened harms are not real is insufficient" in the legislative context. *Id.* at 300 (quoting *Nixon v. Shrink Missouri Gov't*

PAC, 528 U.S. 377, 394 (2000) (rejecting First Amendment challenges to campaign regulations)).

The Linz paper *rejected* in *City of Erie* was published the next year – not in a criminology journal, but in a legal journal (Communication Law & Policy) – and this article is what the concurrence references. (Concur. Op. 16); *Compare* 1999 WL 805047, Appendix (Paper) (Section II: "The Basic Requirements for the Acceptance of Scientific Evidence – Such as "Secondary Effects Studies" Produced by Indianapolis, Phoenix, Los Angeles, and St. Paul – Have Been Prescribed by this Court in *Daubert v. Merrell Dow,* 509 U.S. 579 (1993)) *with* (App. 2034) ("The basic requirements for the acceptance of scientific evidence, such as secondary effects studies, were prescribed by the Supreme Court in the 1993 case of *Daubert*. . . . ").

In *Alameda Books,* the plurality – again over Justice Souter's dissent *and* a Linz paper submitted with an *amicus* brief, *see* 2001 WL 950921 – *rejected* a requirement of empirical evidence and emphasized that when challenging whether *Renton's* deferential standard has been met, the challenger must address "the *municipality's* rationale," not an alternative rationale as imposed by an industry's witness. 535 U.S. at 437-39.

Dr. Linz does not dispute *any* of the facts recited in *any* of the studies, only the conclusions to be drawn from them. Because he applies a different standard – one much higher than the Supreme Court requires – he rejects any reliance on any study that finds secondary effects. However, the purpose of *Alameda Books* burden-shifting is simply to ensure that the Board "meets the standard set forth in *Renton*," *id.* at 439, not *Daubert* or Dr. Linz's idiosyncratic permutation of that standard. The concurrence

accepted Dr. Linz's view and, in doing so, contravened Supreme Court precedent.

B. The concurrence conflicts with *every other circuit* to address the issue.

As an expert witness on behalf of the adult business industry, Dr. Linz has offered the same testimony in many other cases. *Every* other circuit court to address the issue has held that Dr. Linz's testimony, his Communication Law & Policy article, *etc.*, is insufficient as a matter of law to cast direct doubt on the municipality's secondary effects evidence. *See G.M. Enterprises, Inc. v. Town of St. Joseph,* 350 F.3d 631 (7th Cir. 2003); *SOB, Inc. v. County of Benton,* 317 F.3d 856 (8th Cir. 2003); *Gammoh v. City of La Habra,* 395 F.3d 1114 (9th Cir. 2005); *Daytona Grand, Inc. v. City of Daytona Beach,* ___ F.3d ___, 2007 WL 1851169 (11th Cir. June 28, 2007).

In *Daytona Grand,* the district court denied summary judgment to the city on the secondary effects issue and, after a bench trial, granted judgment to the sexually oriented business. The Eleventh Circuit reversed, holding that the sexually oriented businesses' evidence, including Dr. Linz's expert testimony, was legally insufficient to "cast direct doubt" on the municipality's secondary effects rationale and shift the evidentiary burden under *Alameda Books.* In fact, the Eleventh Circuit noted that Dr. Linz's "own analysis shows a statistically significant correlation between adult theaters and increased crime in half of the areas in the study," 2007 WL 1851169 at *17, and "could be read to support part of the City's rationale for Ordinance 81-334," *id.* at *17 n.34.

In all other cases listed above, the circuit courts affirmed summary judgment for the municipality notwithstanding Dr. Linz's testimony. Thus, the panel's holding that Dr. Linz's testimony casts direct doubt on the County's evidence is in direct conflict with every other circuit court to address the issue.

C. The concurrence also violates *Alameda Books* by reversing the judgment even though it found that the Board supplemented the record with evidence renewing support for the Ordinance.

The concurrence violates Supreme Court precedent in yet another way. In *Alameda Books,* the Court held that if plaintiffs successfully shift the evidentiary burden, the municipality need only "supplement the record with evidence renewing support for a theory that justifies its ordinance." 535 U.S. at 439.

Here, the concurrence finds that the County met this burden through its expert witness, Dr. McCleary. Dr. McCleary submitted an expert report prior to the adoption of the Ordinance (App. 1430-1455), and submitted an additional report in the litigation. (App. 2472-2533.) He testified that (1) the studies and opinions of Dr. Linz are invalid, and (2) the reports on which the County relies are reliable. (Concur. Op. 17.) This finding satisfies *Alameda Books* and requires judgment for the County.

Nevertheless, the concurrence holds that the County's supplemental evidence creates a "battle of the experts" involving credibility determinations that require a trial. (Concur. Op. 18.) However, *none* of the authorities cited involved the constitutionality of legislation. In that context

– even in a First Amendment case – experts' disagreement over the need for regulation does not require a trial. *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 211 (1997) (affirming summary judgment in First Amendment case with many experts, and holding the "question is whether the legislative conclusion was reasonable and supported by substantial evidence. . . . If it is, *summary judgment for defendants-appellees is appropriate regardless of whether the evidence is in conflict*").

Thus, the concurrence's own finding shows that the district court's decision is correct.

CONCLUSION

For the reasons stated herein and in its opening Brief, the County petitions the Court to grant rehearing en banc and affirm the decision of the district court in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2007 two copies of the foregoing petition for rehearing en banc (with attached panel decision in Digital Form) were sent by overnight delivery, postage prepaid, and were sent via email to:

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and that the original and eighteen copies were sent by overnight delivery and via email to:

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I further certify that all required privacy redactions (for this submission, none) have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; I also certify that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Norton Antivirus 2007 updated July 24, 2007) and, according to the program, are free of viruses.

s/ Scott D. Bergthold
Scott D. Bergthold

COMMONWEALTH OF KENTUCKY
McCRACKEN DISTRICT COURT
CASE NO: 00-M-01796
CASE NO: 00-M-01797

COMMONWEALTH OF KENTUCKY	PLAINTIFF
VS.	
JOANN WARNER	DEFENDANT
and	
COMMONWEALTH OF KENTUCKY	PLAINTIFF
VS.	
EDWARD GREEN JAMESON	DEFENDANT

TRANSCRIPT OF EVIDENTIARY HEARING
HON. BARD K. BRIAN, PRESIDING JUDGE
October 18th, 2001

Commonwealth represented by:

Hon. Doug McCann
Asst. County Attorney

Defendant represented by:

Hon. Delbert K. Pruitt
Bryant & Kautz PSC

Witness:

Brent Stringer – E911 Director
Melissa Meyer – Shift Manager – The Playhouse
Joann Warner – Defendant

* * *

[6] *Direct Examination by Mr. Pruitt*:

Q. State your name please.

A. Brent Stringer, S-T-R-I-N-G-E-R.

Q. Okay and where are you employed Mr. Stringer?

A. Paducah/McCracken E-911 Communication Services.

Q. Okay and what's your position there?

A. Acting chief dispatcher.

Q. Okay and what duties does that entail?

A. Basically scheduling, keeping up the computer, uh, maintaining the operations, daily operations of the center.

Q. I'm going to show you some documents, Mr. Stringer. If you would take a look at 'em, I'm going to identify 'em.

[7] MR. PRUITT: If I may approach him, Your Honor.

JUDGE BRIAN: Yes.

A. These here are our records that reflect activity at various locations; it's a question that we had been requested to research.

Q. And that was pursuant to my subpoena, correct?

A. Right.

Q. Generally tell the Court what these records show?

A. These records will show basically the activity that's, that involve, these activity involve the lives of these addresses, particular dates, times and what exactly the incident or occurrence was at that particular location for a given date.

JUDGE BRIAN: Let me interrupt Mr. Pruitt. What was the subpoena for because I have not seen the subpoena so that might help lay a basis for what you're going to talk about?

MR. PRUITT: I'll give you the subpoena.

JUDGE BRIAN: That's what I want is just the subpoena so I'll know what he's about to testify to. I know they're records but I don't know what you subpoenaed. Okay, go ahead Mr. Pruitt.

Q. Now what do you mean by activity Mr. Stringer?

A. These are calls that we received from those locations or activity that was self-initiated by an officer. Various types of complaints.

Q. Would that –

A. These complaints I put a label here on the printouts.

Q. Does that include all calls from all law enforcement agencies?

A. Calls within our jurisdiction, the City of Paducah and the McCracken County Sheriff's Department.

Q. Any any other calls that came in over 911 itself?

A. 911 or the administration lines.

* * *

[15] Cross-Examination by Commonwealth:

Q. Yes, Mr. Stringer can you tell us how arrests are made in the same time period at Ginger & Pickles?

A. No sir I can't.

Q. Or Regina's II?

A. I sure can't.

Q. Your records don't reflect that type of information?

A. It does reflect that type of information but it would take I mean I could probably look at that and find the number of arrests but it would take – these particular records here no I'd have to look at the individual ones.

Q. Let me rephrase the question, do they reflect all the arrests at Ginger & Pickles?

A. They should.

Q. If an officer makes any arrest for any reason it would show on the records?

[16] A. Yes.

Q. Would it show the number of complaints from these two?

A. Explain that to me.

Q. Would it show the number of complaints of people calling and complained about those drug dealings or prostitution or anything like that?

A. These they don't, it shows where actually the officers were sent to the locations.

Q. So it would show complaints which were made for ['inaudible]

A. No only the activity that we actually had officers responding to.

Q. And any time an officer went in there as an undercover investigation [inaudible]?

A. They would reflect that information if there was an arrest made or they wanted to, if they were making a report on the incident they would call and get a service request number and there would be active a generated card activated on that.

[17] Q. If an agency made an undercover investigation to determine whether certain complaints had any validity or not, your records wouldn't necessary reflect that?

A. There are times when they do reflect that whenever they are actually in these establishment, not probably at the time they're in the establishment but what times that they do some type of investigation, if they go in there undercover and recover some type of drug paraphernalia or drugs they'll call, they'll make a report on that and they'll generate information. In those aspects, yes they are recorded.

Q. Whenever an undercover investigation happens at Ginger & Pickles or big Kahauna or Regina's II it would show on your records?

A. The ones that I'm aware of are on here. Now I'm not saying that every one that they actually do is recorded. They may do some that we do not know about but the ones I'm referring to are the ones that actually and if I need information or want a service request number generated for my activity there [18] tonight. Now if they went out

there Tuesday night and didn't tell nobody I'd have no way of knowing that.

MR. McCANN: I have nothing further.

* * *